

---

# Vermont Criminal Law Month

---

October - November 2015

---



## Vermont Supreme Court Slip Opinions: Full Court Rulings

*Includes three justice bail appeals*

### **COURT ERRED IN SEALING PORTIONS OF COMPETENCY REPORTS**

State v. Gotavaska and State v. Bercik,  
2015-133. STANDING; MOOTNESS.  
COMPETENCY REPORTS: SEALING.

Trial court's order to seal certain portions of competency reports reversed and remanded. 1) The prosecutor had standing to assert public access concerns in these proceedings, in which the trial court redacted certain "less-relevant" portions of competency reports. Nor were the appeals moot, where each defendant's competency remains subject to further evaluation and consideration by the criminal division. Even if the matters were moot, they fall within the exception for situations capable of repetition yet evading review. 2) The statute requires that the relevant portion of a competency evaluation shall be admitted into evidence, and does not create hierarchies of relevance or provide the trial court with

discretion to exclude relevant portions of competency reports. Nor may the court rely upon a competency report in determining competency but not admit at least the relevant portions of the report. Such portions of a report otherwise accessible by the public might be redacted in a case where the necessary showing of good cause and exceptional circumstances has been made on a case-specific basis, but no findings approaching that which would be necessary to redact portions of any report were made here. The Rule 401 standard of relevance applies here. Skoglund dissent: The trial judge has discretion to admit into evidence only relevant portions of a competency evaluation. Docs. 2014-284, 285, and 286, November 13, 2015. <https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/op14-284.pdf>

### **DEFENDANT'S CHALLENGE TO DENIAL OF EARLY DISCHARGE FROM PROBATION MOOTED BY HIS DISCHARGE**

State v. Theodorou, 2015 VT 139.  
MOOTNESS.

Appeal from denial of motion for early

discharge from a fixed term of probation denied as moot, since the defendant's fixed term of probation expired pending the appeal. Neither the collateral

consequences doctrine nor the “too short to litigate and may recur” exception apply. Doc. 2014-139, October 27, 2015. <https://www.vermontjudiciary.org/LC/Supre>

[me%20Court%20Published%20Decisions/eo14-335.pdf](https://www.vermontjudiciary.org/LC/Supreme%20Court%20Published%20Decisions/eo14-335.pdf)



## Vermont Supreme Court Slip Opinions: 3 Justice Panel Rulings

*Note: The precedential value of decisions of three-justice panels of the Vermont Supreme Court is governed by V.R.A.P. 33.1(c), which states that such decisions “may be cited as persuasive authority but shall not be considered as controlling precedent.” Such decisions are controlling “with respect to issues of claim preclusion, issue preclusion, law of the case, and similar issues involving the parties or facts of the case in which the decision was issued.”*

### LACK OF CONSENT BY ITSELF CAN PROVE COMPULSION

State v. Smith, three-justice entry order.  
SEXUAL ASSAULT: INSTRUCTION RE LACK OF CONSENT; SUFFICIENCY OF THE EVIDENCE. UNDUE PREJUDICE: TRIAL COURT DISCRETION.

Attempted sexual assault and aggravated sexual assault affirmed. 1) The trial court did not err when it instructed the jury that the element of compulsion is satisfied by lack of consent alone. The statute prohibits compelling another person to participate in a sexual act, and provides three ways in which compelling may be committed, including lack of consent. 2) The evidence was sufficient to support the verdict, where

the complainant testified that the defendant repeatedly asked her for sex and she told him no multiple times, yet he persisted and had sex with her without her consent; and there were text messages and an audio recording in which the complainant voiced her lack of consent to sexual activity with the defendant more than 280 times. 3) The text messages were properly admitted despite a Rule 403 objection. The court properly exercised its discretion on this point and the defendant does not show an abuse of that discretion. Doc. 2014-422, October Term 2015. <https://www.vermontjudiciary.org/UPEO2011Present/eo14-422.pdf>

### FACTS OF CASE DID NOT REQUIRE UNANIMITY INSTRUCTION

State v. Davis, three-justice entry order.  
JURY VERDICT: UNANIMITY REQUIREMENT.

Aiding in the commission of felony assault and robbery affirmed. It was not plain error where the instructions did not require the jury to be unanimous as to which act or acts amounted to aiding in the commission of the assault or robbery. The instructions

generally required that the verdict must be unanimous. Unlike the case in State v. Deslandes, which presented two discrete acts which could have permitted the jury to convict, and the defendant was prejudiced by the court’s failure to require the jury to agree on one set of facts, here there was no distinction between separate acts; rather, the defendant’s actions were presented at trial as a continuous whole. There were not

alternative sets of facts that could independently support a conviction. It was clear which acts the State was relying upon (brandishing a weapon), which the defense

contested as a factual matter. Doc. 2015-015, October Term, 2015.

<https://www.vermontjudiciary.org/UPEO2011Present/eo15-015.pdf>

## **PLEA TO NON-EXISTENCE CRIME MUST BE STRICKEN RATHER THAN SENTENCED UNDER THEN-EXISTING, ANALOGOUS STATUTE**

State v. Snyder, three-justice entry order. ILLEGAL SENTENCE: STATUTE NOT IN EFFECT AT TIME OF OFFENSE; REMEDY WHERE DEFENDANT PLEADS TO NON-EXISTENT CRIME.

Sentence following guilty plea to aggravated sexual assault reversed. The defendant pleaded guilty to aggravated sexual assault, engaging in a sexual act with a victim under the age of 13, while the defendant was at least 18. However, the victim turned 13 four years before this statute went into effect, and therefore the defendant could not have violated this version of the statute. The defendant argues that the matter should be remanded for resentencing under the statute that was in effect at the time, which required the victim to be under ten, and did not provide a mandatory minimum sentence. The State agrees that there was an error, but argues that the plea should be

revoked for lack of a factual basis and the matter remanded for further proceedings. The defendant responds that there was a factual basis for the plea because the defendant had agreed at the change of plea proceeding to having had sex with the victim while she was under the age of ten. 1) It was plain error to impose a mandatory minimum term when the statute in effect at the time of the offense carried no mandatory minimum term. 2) In addition, no factual basis was established, or could have been established, to demonstrate that the defendant violated the statute to which he pled guilty, because that statute was not in effect at the time of the offense that he admitted. Therefore, the judgement of conviction was plain error, and must be vacated. Doc. 2015-056, October Term 2015.

<https://www.vermontjudiciary.org/UPEO2011Present/eo15-056.pdf>

*Cases marked with an asterisk were handled by the AGO.*

*Vermont Criminal Law Month is published bi-monthly by the Vermont Attorney General's Office, Criminal Justice Division. For information contact David Tartter at [david.tartter@vermont.gov](mailto:david.tartter@vermont.gov).*